IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Application No.2432 of 2007

K.N.P.Securities Pvt.Ltd. & ors. Applicants
Vs.
20th Century Holding (P) Ltd. & anr. Respondents

Mr.Nitin Pradhan with Ms.S.D.Khot i/b. M/s. M. Dhruva & Co. for applicants.

Mr.S.V.Marwadi for resp.no.1.

Mr.A.S.Shitole, APP for State.

CORAM: B.H.MARLAPALLE, J.
October 4, 2007.

P.C.

1. Heard Mr.Pradhan, the learned counsel for the applicants and Mr.Marwadi, the learned counsel for the respondent no.1 - company. The learned APP appears for the State. In this application filed under Section 482 of Cr.P.C. the applicants have prayed for quashing and setting aside the order dated 7/7/2007 passed by the learned Metropolitan Magistrate, 28th Court, Esplanade, Mumbai in CC No.1881/SS/05 thereby rejecting the application claimed to have been filed under Section 145(2) of the Negotiable Instruments Act, 1881 under which the complaint has been filed.

2. The applicant no.1 had drawn a cheque bearing No.830635 dated 15/2/2001 on Global Trust Bank Ltd., Fort Branch, Mumbai in the sum of Rs.17 crores in favour of the respondent no.1 and on dishonour of the same on or about 2/5/2001 a statutory notice was issued on 10/5/2001 and on its receipt the applicant no.1 - Company failed to pay the amount of Rs.17 crores to the respondent no.1 within 15 days and, therefore, the respondent no.1 filed the complaint under Section 138 of the act on or about 21/8/2001, which has been now registered as CC No.1881/SS/05. Affidavit by way of examination-in-chief of Shri Venkatesh Kamath, Director of the complaint - company was filed before the trial Court under Section 145(1) of the Act on 30/9/2004. On or about 14/6/2007 i.e. after about three years the application at Exhibit 45 purportedly under Section 145(2) of the Act came to be filed by the accused praying before the Court to call upon the complainant to prove the contents of the examination in chief as well as the documents referred therein, in accordance with the provisions of the Indian Evidence Act, 1872. The complainant filed its reply opposing the application at Exhibit 45 and after hearing both the parties the learned Metropolitan Magistrate was pleased to reject the

said application by the impugned order dated 7/7/2007. It was contended by the complainant that the said application at Exhibit 45 was not maintainable and it was required to be rejected as such in view of the law laid down by a Division Bench of this Court in the case of KSL & Industries Ltd. vs. Mannalal Khandelwal & anr. **[2005 (1) Bombay Cases Reporter (Criminal) 520]** and also decision of the Single Bench of this Court in the case of Peacock Industries Ltd. vs. Budhrani Finance Ltd. & ors. **[2006 (2) Bombay Cases Report (Cri) 368]**. The reasoning set out by the trial Court in rejecting the application at Exhibit 45 reads as under:

> "From the above observation of their Lordship it is clear that complainant can give his evidence by filing affidavit. Similarly his Lordship of Bombay High Court also held in case of Peacock Industries Limited Versus Budhrani Finance Limited & ors. that the complainant can give evidence of affidavit. According to me if any document is not proved by the complainant then the accused can point out during the course of arguments that particular document is not proved. Mere

exhibit number given to the document it does not mean that the said document is not proved according to law. Similarly the accused can also bring on record the contradictions during the course of cross-examination. In this case the affidavit of evidence has been filed by the complainant on 30/9/2004. Thereafter the accused is trying to avoid cross-examination. There is no point to allow this application and it deserves to be rejected. Therefore, I answer point no.1 in the negative and pass the following order -

The application is rejected."

3. Mr.Pradhan, the learned counsel for the accused referred to the affidavit in examination in chief and submitted that along with the same for the first time the following five documents were sought to be brought on record by the complainant and it was necessary that the said documents were proved by the affiant and the application at Exhibit 45 was made on fulfilling the statutory requirement as envisaged under Section 145(2) of the Act:

(a) Certified copy of the resolution passed in the meeting of the Directors of the company held on 11/6/2001 authorising Shri Venkatesh Kamath, Director of the company to file the complaint.

(b) Cheque dated 15/2/2001 in the sum of Rs.17 crores and bearing no.830635.

(c) Cheque return memo of the Global Trust Bank Ltd. dated 2/5/2001.

(d) Letter dated 10/5/2001 addressed by the complainant - company to the accused no.1 - company. And

(e) Postal acknowledgement receipt signed on behalf of the accused no.1 on 14/5/2001.

4. Mr.Pradhan referred to the provisions of Section 145 of the Act as well as provisions of Section 137 of the Indian Evidence Act and submitted that it is imperative for the affiant to enter the witness box and depose on oath regarding the truthfulness of the statements made in the affidavit

as well as the documents annexed thereto and, therefore, the trial Court fell in gross error in rejecting the application. Mr. Pradhan also submitted that the decision of this Court in the case of KSL & Industries Ltd. (Supra) has already been stayed by the Apex Court and, therefore, this application is required to be admitted and the trial of the criminal complaint is required to be stayed. As per Mr. Pradhan sub-section (1) and sub-section (2) of Section 145 of the Act are independent of each other and under sub-section (1) the complainant has the liberty to file affidavit by way of examination in chief but as per sub-section (2) if an application is made by the accused, it is mandatory for the trial Court to call upon the affiant to stand in the witness box so as to prove the contents of his affidavit in examination in chief.

5. Similar arguments were advanced before me in Criminal Writ Petition Nos.1558 to 1560 of 2007 by Mr.Marwadi who is appearing in the instant case on behalf of the original complainant and the petitions were rejected on the following reasons:

"Having regard to the scheme of Sections 138,

139, 140 and 141 of the Act the documents either submitted along with the complaint or alongwith affidavit in examination-in-chief even if exhibited, cannot be read in evidence per se. For example, there is a bankers slip regarding dishonour of the cheque, the right of the accused to issue summons to the concerned bank officer for examining him as a witness cannot be taken away. Such an envelope if exhibited, that itself cannot be the proof of service or failure to accept the said envelope by the addressee unless the postman concerned has been examined. All these things can be brought on record by way of cross examination on the affidavit. The erroneous approach followed in some cases cannot be a reason to accept as a general proposition that the affiant is required to be put in the witness box for recording his examination-in-chief regarding the facts stated in the said affidavit over and above the facts as stated in the complaint. In Criminal Writ Petition No.1781 of 2007 and Criminal Application No.382 of 2007 similar grievance was raised before this court namely

> the right of the accused to pray for issue of summons to the affiant for recording his examination-in-chief. It is well settled that when an affidavit by way of examination in chief is presented in the trial, the same is not to be exhibited per se unless the affiant stands in the witness box and states on oath that the facts stated in the said affidavit are correct and as per his knowledge and belief and after recording such verification the affiant is subjected to cross examination by the accused. The learned Metropolitan Magistrate while passing the impugned order has certainly demonstrated his awareness of the procedural law and, therefore, no prejudice has been caused to the present petitioners by the impugned order rejecting the applications for issue of witness summons."

6. Section 137 of the Evidence Act states that the examination of a witness by the party who calls him shall be called his examination-in-chief and the examination of a witness by the adverse party shall be called his cross-examination. As per Section 138

of the said Act, the witness shall be first examined in chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to the relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. In the cases under the Act, the affiant shall have to step in the witness box and verify / affirm the contents therein to be true as per his personal knowledge and information and then only it could be exhibited. Placing on record the affidavit in examination-in-chief by itself cannot become the examination-in-chief of the complainant and once the affiant stands in the witness box and verifies the same on oath, it acquires the meaning of examination-in-chief and, thereafter the affiant is subjected to cross-examination by the opposite party viz. the accused in the instant case. The accused are free to cross-examine the affiant on the statement of facts as well as the documents referred to in the said affidavit. It is for the accused to test the truthfulness of the statements made in the affidavit as well as the documents referred to therein during the cross-examination of the affiant.

The defence counsel cannot insist that the affiant after he has verified about the correctness of the statements made in the affidavit by way of examination in chief, be further examined by his counsel (the complainant's counsel) regarding the truthfulness of the statements made in the affidavit. It is for the defence counsel to subject the affiant to cross-examination so as to test the veracity of the statements made in the affidavit as well as the documents referred therein.

7. The trial Court has stated that the application at Exhibit 45 was filed belatedly and it is obvious that it was filed almost after three years and the trial Court is, therefore, justified in observing that the application was filed for delaying the trial. If on filing the affidavit in examination in chief the affiant has not entered the witness box for its verification, undoubtedly the trial Court will have to call upon the affiant to do so and thereafter the defence counsel is at liberty to cross-examine him i.e. the affiant and it will be for the defence counsel to put to test the veracity of the statements made in the affidavit as well as the documents referred therein.

8. At the same time it is pertinent to note in the instant case that the applicants have invoked the inherent powers of this Court under Section 482 of Cr.P.C. It envisages three circumstances under which the inherent jurisdiction may be exercised by the High Court viz. (a) to give effect to an order under the Code, (b) to prevent abuse of the process of Court and (c) to otherwise secure the ends of justice. The applicants have not challenged the impugned order by filing a writ petition so as to invoke the supervisory powers of this Court to quash and set aside the said order. It cannot be said that the impugned order amounts to abuse of the process of the Court or that the instant application has been filed to otherwise secure the ends of justice. The provisions of Section 145(2) of the Act cannot be invoked to delay the trials of the complaints filed under Section 138 of the said Act which envisages a speedy disposal of such complaints and generally trials are to be completed within six months. Section 145(2) of the Act does not give a right in favour of the accused or it does not envisage what was prayed for in the application at Exhibit 45 viz. to call upon the affiant to stand in the witness box

and prove the correctness of the statements in the affidavit and the documents referred to therein by subjecting him to examination in chief. The application filed at Exhibit 45 was thus in fact an abuse of the process of the Court and it has been rightly rejected.

9. Hence this application fails at the threshold and the same is hereby rejected.

(B.H.MARL